STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 15, 2014
v	No. 314309 Macomb Circuit Court
PHILLIP RANDALL, Defendant-Appellant.	LC No. 2012-001496-FC

Before: DONOFRIO, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a; MCL 750.529, third-degree fleeing and eluding a police officer, MCL 257.602a(3), assaulting, resisting, or obstructing a police officer, MCL 750.81d(1), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm) second offense, MCL 750.227b. We affirm.

I. MOTION TO SUPPRESS

Defendant argues that the trial court erred by denying his motion to suppress his statements to Officer Kenneth Csizmadia. We disagree.

This Court reviews for clear error a trial court's findings of fact in a suppression hearing. *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009). "A factual finding is clearly erroneous if it leaves the Court with a definite and firm conviction that the trial court made a mistake." *People v Steele*, 292 Mich App 308, 313; 806 NW2d 753 (2011). This Court reviews a trial court's ultimate decision on a motion to suppress de novo. *Id*.

Defendant first suggests that his statements to Officer Csizmadia should have been suppressed because he was never provided his *Miranda* warnings. The right against self-incrimination is guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and our state constitution. US Const, Am V, Am XIV; Const 1963, art 1, § 17. To protect a defendant's privilege against self-incrimination, a suspect must be informed of certain rights before he is subjected to a custodial interrogation. *Miranda v Arizona*, 384 US 436, 444-445; 86 S Ct 1602; 16 L Ed 2d 694 (1966). When a defendant is subjected to a custodial interrogation, the defendant must be warned that he "has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the

presence of an attorney, either retained or appointed." *Id*. at 444. A custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *People v Elliott*, 494 Mich 292, 305; 833 NW2d 284 (2013), citing *Miranda*, 384 US at 444. Thus, there are two components that need to be satisfied for requiring *Miranda* rights to be read to a defendant: (1) the defendant must be in custody, and (2) there must be an interrogation.

Whether an accused was in custody depends on the totality of the circumstances, and the key question is whether the accused could have reasonably believed that he or she was not free to leave. *Steele*, 292 Mich App at 316-317. "Interrogation refers to express questioning and to any words or actions on the part of police that the police should know are likely elicit an incriminating response from the subject." *People v Cortez*, 299 Mich App 679, 713-714; 832 NW2d 1 (2013) (citation omitted). Statements made by a defendant during custodial interrogation are inadmissible unless the accused knowingly, voluntarily, and intelligently waived his or her Fifth Amendment rights. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005).

Here, defendant was not subjected to a custodial interrogation when he made the statements. There was no dispute at the *Walker*[1] hearing that defendant was in custody, given that he was handcuffed to the hospital bed and guarded by a police officer. However, Officer Csizmadia testified that he never questioned defendant; rather, it was defendant who initiated the conversation and volunteered his statements. Consequently, the trial court did not clearly err in finding that defendant was not subject to custodial interrogation. Therefore, the police were not required to give *Miranda* warnings. See *Miranda*, 384 US at 444-445.

We also disagree with defendant that the trial court erred in determining that defendant made his statements voluntarily. Involuntary confessions are generally inadmissible because they are unreliable. See *People v Conte*, 421 Mich 704, 754; 365 NW2d 648 (1984). A statement or confession is voluntary when, "considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, whether the accused's will has been overborne and his capacity for self-determination critically impaired." *People v Ryan*, 295 Mich App 388, 396; 819 NW2d 55 (2012), quoting *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988) (internal citations omitted). To determine if a statement is voluntary, the trial court should consider the following factors:

> the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused

[1] *People v Walker*, 371 Mich 599; 124 NW2d 761 (1963).

> was physically abused; and whether the suspect was threatened with abuse. [*Ryan*, 295 Mich App at 396-397, quoting *Cipriano*, 431 Mich at 334.]

"The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness." *Cipriano*, 431 Mich at 334. "The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Id*.

Here, defendant was admitted to the hospital for observation following a car accident that occurred during a police chase. Defendant was handcuffed to the hospital bed and guarded by a police officer. Defendant asked Officer Csizmadia questions about the location of defendant's vehicle and articles of clothing. While Officer Csizmadia responded to defendant's questions, he never posed any questions to defendant. Officer Csizmadia testified that defendant then stated:

> He indicated to me that he'd [rather] die in the hospital than die in jail. He indicated that he walked in Big Boy and didn't commit the robbery at first, but he walked back out to the car, he listened to his instigator[,] which he was referring to as his buddy[,] and he walked back in the Big Boy and committed the robbery, and then he kind of complained that his buddy was so stupid that threw . . . the gun out in a school parking lot.

Although it was undisputed that defendant received six morphine injections, the prosecution noted that they occurred over a two-day period. In addition, there was no evidence that the morphine interfered with defendant's ability to freely and voluntarily make the statements. Officer Csizmadia testified that defendant did not appear to be intoxicated or under the influence of drugs when he made the inculpatory statements. Accordingly, we are not left with a definite and firm conviction that the trial court erred in determining that defendant's statements were given voluntarily and freely.

II. JURISDICTION

Defendant contends in his Standard 4 brief that he is entitled to a new trial because the trial court failed to enter a proper return before the prosecution filed the information, and, thus, did not have jurisdiction over defendant. In addition, he argues that he is entitled to a new trial because he was arraigned before a proper return was entered. We disagree.

"Generally, an issue is not properly preserved unless a party raises the issue before the trial court and the trial court addresses and decides the issue." *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). Defendant did not raise this issue in the trial court. Therefore, the issue is unpreserved for appellate review. We review the unpreserved claim for plain error affecting defendant's substantial rights. *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2011).

"In personam jurisdiction is vested in the circuit court upon the filing of a return of the magistrate before whom the defendant waived preliminary examination . . . or before whom the defendant had been examined." *People v Goecke*, 457 Mich 442, 458; 579 NW2d 868 (1998) (quotation marks and citations omitted). MCL 767.40 provides:

> All informations shall be filed in the court having jurisdiction of the offense specified in the information after the proper return is filed by the examining magistrate and by the prosecuting attorney of the county as informant. The information shall be subscribed by the prosecuting attorney or in his or her name by an assistant prosecuting attorney.

Defects in subject-matter jurisdiction, which involve a court's power over a class of cases, may never be waived and may be raised at any time. *People v Richards*, 205 Mich App 438, 444; 517 NW2d 823 (1994). On the other hand, defects in personal jurisdiction, which involve a court's jurisdiction over a particular defendant, may be waived. *Id*. Here, defendant waived any objections to personal jurisdiction by signing the waiver of preliminary examination, in which it provided, "By waiving my right to a preliminary examination, I will be bound over to Circuit Court for trial on the charges set forth in the complaint." Moreover, defendant appeared in court and was convicted of the above-mentioned charges. Consequently, defendant has waived the right to assert a claim of personal jurisdiction error. See *People v Carter*, 462 Mich 206, 213-216; 612 NW2d 144 (2000) (one who waives his rights to object to an error may not then seek appellate review of a claim depravation of those rights because the waiver extinguishes any error).

III. MOTION TO WITHDRAW

Defendant next argues in his Standard 4 brief that the trial court erred in denying defense counsel's motion to withdraw. We disagree. This Court reviews a trial court's decision regarding a motion to withdraw for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368-369; 592 NW2d 737 (1999).

In determining whether a trial court abused its discretion in denying a defense attorney's motion to withdraw, this Court considers the following factors:

> (1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*Id*. at 369.]

The Sixth Amendment guarantees a defendant's right to counsel. *People v Buie*, 298 Mich App 50, 67; 825 NW2d 361 (2012). An indigent defendant is entitled to the appointment of effective counsel, but he does not have the right to have counsel of his choosing appointed. *People v Portillo*, 241 Mich App 540, 543; 616 NW2d 707 (2000). As this Court stated in *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001), quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991):

> "An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution

> will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic."

The trial court did not abuse its discretion in denying defense counsel's motion to withdraw. Defendant has misrepresented the record in asserting that the trial court made no inquiry into whether there was a breakdown of the attorney-client relationship. On the first day of trial, the trial court questioned defendant regarding why he wanted his trial counsel to withdraw. Defendant merely responded that his trial counsel was ineffective and that he did not want trial counsel to represent him. Defendant also asserted that he and counsel were arguing and not in agreement, but failed to assert a legitimate difference of opinion. Defense counsel stated that he was prepared for trial.

In addition, defendant has not demonstrated actual prejudice. A review of the record reveals that trial counsel argued that defendant was not the perpetrator and that he was improperly identified. The record evidence established that defendant entered the Big Boy, left, and returned 20 to 30 minutes later. Defendant pulled out a gun and told the cashier to give him the money from the cash register. Defendant also took money from the safe in the manager's office. After defendant left the building, a cook at Big Boy looked through a nearby window and saw a four-door red or burgundy car speeding away. Defendant was apprehended after a police chase that resulted in a collision with another vehicle. At the hospital, defendant told Officer Csizmadia that he robbed the Big Boy. Therefore, defendant has not demonstrated that the trial court abused its discretion in denying his trial counsel's motion to withdraw.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues in his Standard 4 brief that his trial counsel's assistance was ineffective because trial counsel was not adequately prepared for trial and failed to file pretrial motions at defendant's request. We disagree.

To properly preserve an ineffective assistance of counsel claim, a defendant must move for a new trial or seek an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). *People v Armisted*, 295 Mich App 32, 46; 811 NW2d 47 (2011). Defendant did neither. Therefore, the issue is unpreserved for appellate review.

This Court reviews defendant's unpreserved claim of ineffective assistance of counsel for errors apparent on the record. *Id*. Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*.

Effective assistance of counsel is presumed. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To establish a claim for ineffective assistance of counsel, a defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must establish that "counsel's representation fell below an objective standard of reasonableness." *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012), citing *Strickland*, 466 US at 688. The defendant must overcome a strong

presumption that the assistance of his counsel was sound trial strategy. *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). This Court determines whether, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Vaughn*, 491 Mich at 670, citing *Strickland*, 466 US at 690. Second, the defendant must show that trial counsel's deficient performance prejudiced his defense. *Strickland*, 466 US at 687. To demonstrate prejudice, a defendant must show the existence of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Vaughn*, 691 Mich at 669, citing *Strickland*, 466 US at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), citing *Strickland*, 466 US at 694.

Defendant claims that "[i]t is obvious counsel needed more time" and that it was "clearly evident counsel did absolutely nothing." Although lack of adequate trial preparation can constitute ineffective assistance of counsel, *People v Dixon*, 263 Mich App 393, 396-397; 688 NW2d 308 (2004), it is apparent that defendant's assertions are not supported by the record. Trial counsel was appointed after defendant's first appointed counsel withdrew due to medical reasons. At the October 9, 2012, pretrial hearing, trial counsel informed the court that he had reviewed two of the three videos from the police cruisers and had requested the third from the prosecution. Trial counsel stated that he was prepared to go to trial subject to receiving the third video. On the first day of trial, trial counsel informed the court that he had an opportunity to view the third video and was prepared to proceed to trial. At trial, counsel argued that defendant was not the perpetrator and that he was improperly identified.

Defendant also contends that trial counsel was not prepared for trial because he failed to file several pretrial motions that defendant requested. However, decisions on which motions to file are matters of trial strategy, *Traylor*, 245 Mich App at 463, and trial counsel stated that he was prepared for trial. Moreover, defendant has failed to demonstrate any prejudice as a result of those motions not being filed. Therefore, defendant has failed to establish that he is entitled to a new trial on the basis of ineffective assistance of counsel.

Affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen